No. 87-6116

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

STEVEN ANTHONY PENSON, *Petitioner,*

v.

STATE OF OHIO, *Respondent*

On Writ Of Certiorari To The Court Of Appeals Of Montgomery County, Ohio

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

I. Can Appellate Counsel's Failure To File A Brief On Direct Appeal Be Considered Non-Prejudicial Or Harmless Error As The Ohio Court Of Appeals Found?

II. When The Ohio Court Of Appeals Determined That There Were Arguable Issues That Could Be Raised On Appeal, Was The Court Required To Afford Petitioner The Assistance Of Counsel Before Reviewing His Case And Affirming His Convictions?

III. Is An Indigent Defendant Denied Equal Protection, Due Process And Effective Assistance Of Counsel On His Direct Appeal When His Counsel Refuses To File A Brief, Withdraws From His Nonfrivolous Appeal, And The Appellate Court Affirms His Convictions Without Affording Him The Assistance Of Counsel, After Reviewing The Record And The Arguable Issues Raised By His Co-Defendants?

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The order of the Supreme Court of Ohio [Joint Appendix (hereafter J.A.) 45] overruling Petitioner Penson's motion for leave to appeal and claimed appeal as of right from the judgment of the Court of Appeals of Montgomery County, Ohio is not reported. The opinion of the Court of Appeals of Montgomery County, Ohio (J.A. 38) is not reported.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on October 21, 1987. (J.A. 45). The petition for certiorari was filed within 60 days of that date, on December 21, 1987, and was granted on February 22, 1988. The jurisdiction of this Court rests upon 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth and Fourteenth Amendments to the Constitution of the United States which provide, in pertinent part:

SIXTH AMENDMENT

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

FOURTEENTH AMENDMENT

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction

thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. ***

STATEMENT OF THE CASE

After a jury trial in the Montgomery County, Ohio Court of Common Pleas, petitioner, Steven Anthony Penson, was found guilty of the offenses of rape (14 counts), Ohio Revised Code Annotated (Page) (O.R.C.) § 2907.02(A)(1); aggravated burglary, O.R.C. § 2911.11(A)(3); aggravated robbery (two counts), O.R.C. § 2911.01(A)(1); felonious assault (two counts), O.R.C. § 2903.11(A)(2); attempted rape, O.R.C. § 2923.02; gross sexual imposition, O.R.C. § 2907.05(A)(1); and having a firearm under a disability, O.R.C. § 2923.13(A)(2). Penson was also found guilty of firearm specifications, O.R.C. § 2929.71, attached to each of the above counts. (J.A. 39). On December 27, 1984, Penson was sentenced to a term of imprisonment of eighteen (18) to twenty-eight (28) years. (J.A. 39).

On January 8, 1985, new counsel, Douglas Shaeffer, was appointed to represent Penson on appeal. (J.A. 1). Penson timely appealed the judgment of the Montgomery County Court of Common Pleas to the Montgomery County, Ohio Court of Appeals, Second Appellate District (J.A. 1).

On June 2, 1986,[1] appellate counsel filed a "CERTIFICATION OF MERITLESS APPEAL" and a

[1] This date is incorrectly printed in the Joint Appendix as June 2, 1985. *See* J.A. 35.

motion to withdraw as appellate counsel. (J.A. 35). Counsel represented to the court that he had reviewed the record on appeal, that he had "found no errors requiring reversal, modification, and or vacation" of Penson's convictions or sentences, and that he would not file a "meritless appeal." (J.A. 35). Counsel's motion to withdraw requested the court to relieve him of any further responsibility to prosecute the appeal.[2] (J.A. 35-36). On June 9, 1986, the Court of Appeals granted appellate counsel's motion to withdraw, and granted Penson thirty (30) days to file a *pro se* brief. (J.A. 37). The court subsequently granted several requests by Penson for extensions of time to file a brief and his request to borrow the trial transcript. (J.A. 40). On November 13, 1986, the court denied Penson's request for appointment of new counsel, but granted him fifteen (15) more days to use the transcript. (J.A. 40). Penson was thereafter granted a final twenty-five (25) day extension to file a brief. No brief was ever filed. (J.A. 40).

On June 5, 1987, the Ohio Court of Appeals rendered its Opinion in this case. (J.A. 38). The Court of Appeals indicated that *Anders* v. *California*, 386 U.S. 738 (1967), required it to review the record of the trial court proceedings to determine if Penson received a fair trial and whether any prejudicial error occurred. (J.A. 40). The court stated that it was troubled by counsel's filing of an "*Anders* brief." The court found counsel's claims that there were no errors "which could arguably support the appeal to be highly questionable." (J.A. 40). The court

[2] Counsel's certification and motion also included Penson's appeal in a separate case, No. 84-CR-1056, which bore the same case number on appeal, No. 9193, as the present case, but was separately decided. The Court of Appeals judgment in Case No. 84-CR-1056 is not before this court as it was not appealed to the Ohio Supreme Court.

concluded this because "considerable briefs" were filed by counsel for Penson's co-defendants, Richard Brooks and John Smith, in their respective appeals. (J.A. 40-41). The court further found that "[t]he record of the trial court does support several arguable claims." (J.A. 41).

Nevertheless, the court determined that because it had examined the record and already considered the assignments of error raised in the other defendants' appeals, Penson had "suffered no prejudice in his counsel's failure to give a more conscientious examination of the record." (J.A. 41).

Pursuant to its own review of the record, the Ohio Court of Appeals did address one issue. The court determined that the trial court failed to charge the jury on one of the elements of the crime of felonious assault in counts five and six of the indictment. (J.A. 41). Because trial counsel failed to object, the court reviewed the errors under a plain error standard. The court found plain error only with respect to count six. (J.A. 42-43). Penson's conviction and sentence on count six was reversed. (J.A. 43). Penson's convictions and sentences were otherwise affirmed. (J.A. 43-44).

Penson timely appealed the judgment of the Ohio Court of Appeals to the Supreme Court of Ohio. On October 21, 1987, the Supreme Court dismissed his appeal on the ground that "no substantial constitutional question exist[ed] therein." (J.A. 45). Penson timely filed a petition for writ of certiorari in this Court on December 21, 1987. This Court granted certiorari on February 22, 1988.

SUMMARY OF ARGUMENT

This Court has established "minimum safeguards" to assure an indigent defendant adequate and effective

review of his conviction. *Evitts* v. *Lucey*, 469 U.S. 387, 392 (1985). By far the most significant is the right to counsel. Counsel plays a fundamental and essential role in the appellate review process. *Douglas* v. *California*, 372 U.S. 353 (1963); *Evitts*, 469 U.S. at 392. Without counsel, an appeal is little more than a "meaningless ritual." *Douglas*, 372 U.S. at 358.

When counsel has been denied or has failed to render any assistance on appeal, this Court has consistently required a new appeal. *Douglas*, 372 U.S. at 353; *Swenson* v. *Bosler*, 386 U.S. 258 (1967); *Anders* v. *California*, 386 U.S. 738 (1967). These decisions recognize that counsel not only provides substantial benefit to the accused but assists the court in reaching a fair and reliable result. Thus, this Court held in *Anders*, *id.* at 738, that appellate counsel could not withdraw from an appeal simply because counsel concluded that the appeal had no merit. An indigent defendant can be assured a fair appeal and equality with others only if counsel plays the role of an advocate and supports the appeal to the best of his ability. *Id.* at 744. This requires counsel to file a brief on the arguable issues in a nonfrivolous appeal and to identify issues that might support the appeal in one he deems frivolous.

In this case, the Ohio Court of Appeals violated the requirements of *Anders* by permitting counsel to withdraw without filing a brief of any type after counsel summarily stated that there were no reversible errors. (J.A. 40). Moreover, the Ohio Court of Appeals expressly disagreed with counsel and found not only arguable errors, but one reversible error. (J.A. 42). Again violating *Anders*, the Court still refused to provide Penson counsel to argue his appeal despite Penson's request for new counsel. The Court instead considered and decided his appeal

without benefit of counsel, finding that Penson was not prejudiced by his counsel's withdrawal. (J.A. 38). The Court's failure to follow *Anders* and require counsel to file a brief effectively denied Penson counsel on appeal.

This Court's decisions in *Jones* v. *Barnes*, 463 U.S. 745, 749 (1983), and *Evitts*, 469 U.S. at 396-397, reaffirmed the requirement of *Anders* that counsel file a brief in every nonfrivolous appeal. Counsel cannot be an effective advocate on appeal if he does not file a brief. The brief is the primary tool of the appellate advocate. Counsel's citation to the record and legal authorities in a brief helps the court understand the salient facts and critical issues so that it can make a fair and reliable determination of the merits of the appeal. The failure of the court to require this type of written advocacy in a brief is the equivalent of failing to appoint counsel at all.

The *Anders* requirement that an adequate brief be filed has thus been upheld by the Second, Sixth, Seventh, Eighth, Ninth, Eleventh and District of Columbia Circuits without a showing of prejudice. *See, e.g., Jenkins* v. *Coombe*, 821 F.2d 158 (2nd Cir. 1987), *cert. denied*, ___ U.S. ___, 98 L.Ed.2d 655 (1988); *Cannon* v. *Berry*, 727 F.2d 1020 (11th Cir. 1984). To require indigent defendants to demonstrate prejudice in this situation is to effectively deny them counsel in most cases.

Under the *Strickland* v. *Washington*, 466 U.S. 668 (1984), and *United States* v. *Cronic*, 466 U.S. 648 (1984), standards for ineffective assistance of counsel, prejudice must be presumed when counsel is denied or counsel fails to perform. *Strickland* emphasized that counsel's advocacy plays a vital role that is critical to the ability of the adversarial process to produce just results. *Strickland*, 466 U.S. at 685. Thus, where counsel is denied or

counsel fails to participate in the adversarial process, prejudice is presumed. *Cronic*, 466 U.S. at 659. In an appellate context, if counsel has not filed a brief he is effectively absent from the proceedings. Secondly, counsel's nonperformance undermines the adversarial process on appeal. It simply does not occur. Penson's situation is indistinguishable from that of someone who had no counsel at all. *See Evitts*, 469 U.S. at 395n. 6. Any result must be presumptively unreliable. The Second, Sixth, and Eleventh Circuits agree that counsel's failure to file an adequate brief is presumptively prejudicial under *Strickland* standards. *Cannon*, 727 F.2d 1020; *Freels* v. *Hills*, ___ F.2d ___, No. 87-3016, slip op. (6th Cir. April 6, 1988); *Jenkins*, 821 F.2d 158.

The Ohio Court of Appeals' independent review of the record and consideration of the errors in Penson's co-defendants' appeals did not cure this denial of counsel. Independent review of the record cannot adequately substitute for the assistance counsel provides his client and the court. It is the function of appellate courts to judge, not advocate issues. Even competent counsel sometimes fail to raise meritorious issues. *See Smith* v. *Murray*, 477 U.S. ___, 91 L.Ed.2d 434, 445 (1986).

The right to counsel is a personal right. Penson was entitled to his own independent counsel on appeal just as much as indigent defendants are entitled to their own independent counsel at trial. Where counsel is denied at trial, even though a co-defendant was represented, prejudice is presumed. *Green* v. *Arn*, 809 F.2d 1257 (6th Cir. 1987), *vacated on other grounds*, ___ U.S. ___, 98 L.Ed.2d 17 (1987). There is no difference here. Neither counsel for the co-defendants were consciously advocating on Penson's behalf. Penson was simply denied his right to counsel. Prejudice must be presumed as in any other

situation where counsel has been denied to an indigent defendant at any crucial stage of the adversarial process.

The right to counsel on appeal insures the fairness and thus the legitimacy of the appellate adversary process. Because of the fundamental nature of the right to counsel this court has never required a showing of prejudice when counsel is denied. *Gideon* v. *Wainwright*, 372 U.S. 335 (1963). Unrepresented indigent defendants can no more be expected to demonstrate prejudice from a denial of counsel than they can be expected to pursue their appeals in the first place. Such a requirement would nullify *Anders* and the right to appellate counsel which it protects. *Pennsylvania* v. *Finley*, 481 U.S. ___, 95 L.Ed.2d 539 (1987). Such a rule would burden the state appellate courts by requiring them to review the cold record and speculate as to the outcome of issues without briefing or oral argument, the very cornerstones of appellate advocacy. Indigent defendants correctly will feel that they have been dealt with unfairly.

On the other hand, a rule requiring a presumption of prejudice when counsel is denied is easy to follow. The denial is easy to identify; and because the court is directly responsible, it is easy for the court to prevent. It further accords the appropriate respect for the fundamental right of counsel. It is the only way to guarantee to an indigent defendant an adequate and effective review of his conviction.

ARGUMENT

AN INDIGENT DEFENDANT IS DENIED EQUAL PROTECTION, DUE PROCESS AND EFFECTIVE ASSISTANCE OF COUNSEL ON HIS DIRECT APPEAL WHEN HIS COUNSEL REFUSES TO FILE A BRIEF, WITHDRAWS FROM HIS NONFRIVOLOUS APPEAL, AND THE APPELLATE COURT AFFIRMS HIS CONVICTIONS WITHOUT AFFORDING HIM THE ASSISTANCE OF COUNSEL, AFTER REVIEWING THE RECORD AND THE ARGUABLE ISSUES RAISED BY HIS CODEFENDANTS.

I. THE FUNDAMENTAL ROLE OF COUNSEL ON APPEAL.

This Court has recognized that a first appeal of right in a state court is an "integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant." *Griffin* v. *Illinois*, 351 U.S. 12, 18 (1956); *Evitts* v. *Lucey*, 469 U.S. 387, 393 (1985). A state's procedures for deciding appeals must therefore satisfy the fairness and equality demanded by the Due Process and Equal Protection Clauses of the Constitution.[3] *Evitts*, at 393. *See, e.g.*, *Griffin* v. *Illinois*, 351 U.S. at 18. Certain "minimum safeguards" necessary to assure an adequate and effective appeal for indigent defendants have been established by the Court. *Evitts*, 469 U.S. at 392. By far the most significant is the right to counsel, see *Douglas* v. *California*, 372 U.S. 353 (1963).

Just as the assistance of counsel is essential to a fair trial, *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), the right to be represented by counsel on appeal is fundamental and essential to adequate and effective review. *Douglas*, 372

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[3] In Ohio, the right to appeal is established by Article IV § 3 of the Ohio Constitution and Ohio Revised Code Annotated (Page) § 2953.02. *See also* Rule 3, Ohio Rules of Appellate Procedure.

U.S. at 356; *Evitts*, 469 U.S. at 392. Lawyers are "necessities, not luxuries" in our adversarial system of criminal justice. *Gideon*, 372 U.S. at 344. As stated by Justice Schaefer of the Illinois Supreme Court:

> "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have."

Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956); *see also United States* v. *Cronic*, 466 U.S. 648, 654 (1984); *Kimmelman* v. *Morrison*, 477 U.S. ___, 91 L.Ed.2d 305, 320 (1986) ("it is through counsel that the accused secures his other rights"). A defendant on appeal seeks to demonstrate that his conviction and loss of liberty is unlawful. *Evitts*, 469 U.S. at 396. To do so he must face an adversary proceeding on appeal that is governed by intricate rules and procedures which are hopelessly forbidding to a layperson. *Id.* Without counsel he is unable to protect the vital interests at stake. *Id.* Thus, absent the "guiding hand of counsel," *Powell* v. *Alabama*, 287 U.S. 45, 69 (1932), the right to an appeal is nothing more than a "meaningless ritual." *Douglas*, 372 U.S. at 358; *Evitts*, 469 U.S. at 393-94.

Of course, the right to counsel on appeal "cannot be satisfied by mere formal appointment." *Avery* v. *Alabama*, 308 U.S. 444, 446 (1940); *Evitts*, 469 U.S. at 395. The right is violated if no actual assistance is provided. *Id.* To be constitutionally adequate, appellate counsel must render "effective assistance." *Id.* at 396. A fortiori, when counsel is absent, does not participate, or renders ineffective assistance, there cannot be a constitutionally adequate and effective appeal.

II. THE DECISIONS OF THIS COURT AND THE LOWER COURTS REQUIRE THAT PREJUDICE BE PRESUMED WHEN COUNSEL HAS BEEN DENIED OR FAILS TO RENDER ANY ASSISTANCE ON APPEAL.

Two principles are evident from this Court's decisions pertaining to the right to counsel on appeal. First, where the right has been denied, this Court has consistently ordered a new appeal without requiring the accused to show that he was prejudiced by the denial or would have prevailed on the merits had counsel been provided. *See Douglas*, 372 U.S. at 353; *Swenson* v. *Bosler*, 386 U.S. 258 (1967); *Anders* v. *California*, 386 U.S. 738 (1967); *Evitts*, 469 U.S. at 387. Secondly, the Court has repeatedly stated that appellate counsel must play the role of an active advocate, as opposed to *amicus curiae*, to provide the type of assistance required by the Constitution. *Anders*, 386 U.S. at 744; *Jones* v. *Barnes*, 463 U.S. 745, 754 (1983); *Evitts*, 469 U.S. at 394.

In *Douglas* v. *California*, 372 U.S. at 354, the Court reviewed a California case where counsel had been denied an indigent on appeal because the court, after an independent review of the record, concluded that counsel would be of no value to either the defendant or the court. The Court held that "when an indigent is forced to run this gauntlet of a preliminary showing of merit" to obtain counsel, the "right to appeal does not comport with fair procedure." *Id.* at 357. The Court pointed out that federal courts must honor an indigent's request for counsel "regardless of what they think the merits of the case may be; and representation in the role of an advocate is required." *Id.* at 357-58. Finally, the Court found that the California procedure denied an indigent defendant equal protection on an appeal of right because the rich man

> . . . enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of

> arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit is forced to shift for himself. The indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal.

Id. at 358.

The same analysis applies to the case at bar. The Ohio Court of Appeals determined that Penson was not prejudiced by his counsel's failure to file a brief and withdrawal from the case because it had "thoroughly examined the record and already considered the assignments of error raised in the other defendants' appeals." (J.A. 40-41). Thus, the Ohio Court of Appeals denied Penson counsel for essentially the same reason the California court did in *Douglas*—because it found counsel would not have benefited him. As indicated by *Douglas*, this conclusion was constitutionally flawed.

In *Swenson* v. *Bosler*, 386 U.S. at 258, the Court found unconstitutional a Missouri procedure whereby indigent defendants' appeals were decided without the appointment of counsel. The Missouri court considered the issues raised in trial counsel's motion for new trial and any *pro se* briefs filed by the defendant. This Court did not require Bosler to show he was prejudiced by the denial of counsel. The Court reasoned:

> The assistance of appellate counsel in preparing and submitting a brief to the appellate court which defines the legal principles upon which the claims of error are based and which designates and interprets the relevant portions of the trial transcript may well be of substantial benefit to the defendant. This advantage may not be denied to a criminal defendant, solely because of his indigency, on the only appeal which the State affords him as a matter of right.

Id. at 259. This advantage was denied Penson.

In *Anders* v. *California*, 386 U.S. 738 (1967), this Court further articulated minimum standards for representation of indigent defendants on appeal. *Anders* is significant because counsel's action in *Anders* was virtually identical to that of Penson's appellate counsel. After reviewing the record, Anders' counsel simply filed a letter with the Court stating there was "no merit" to the appeal. *Id.* at 739. After Anders filed a *pro se* brief, the appellate court affirmed his conviction. Without deciding whether Anders' appeal had any merit, this Court found *Anders'* counsel's "bare conclusion" inadequate. It smacked of the "treatment that Eskridge received." *Id.* at 742. *Eskridge* v. *Washington State Board*, 357 U.S. 214, 215 (1958) (procedure which permitted trial judge to withhold transcript if he felt the defendant had had a fair trial without prejudicial errors held unconstitutional); *see also Lane* v. *Brown*, 372 U.S. 477 (1963) (procedure which permitted public defender to deprive indigent of transcript if he thought appeal would be unsuccessful held unconstitutional). The *Anders* Court, 386 U.S. at 743, noted that the California courts had not found Anders appeal to be frivolous and counsel's actions were those of an *amicus curiae*.

Because *Anders'* counsel did not play the role of an advocate, his appeal did not receive the "full consideration and resolution" it would have had counsel done so. *Id.* The Court then emphasized that the constitutional requirements of substantial equality and fair process can only be attained

> [w]here counsel acts in the role of an active advocate in behalf of his client, as opposed to that of *amicus curiae*. The no-merit letter and the procedure it triggers do not reach that dignity. Counsel should, and can with honor and without conflict, be of more

> assistance to his client and to the court. His role as advocate requires that he support his client's appeal to the best of his ability.

Id. at 744. *See also Ellis* v. *United States*, 356 U.S. 674 (1958). Thus, *Anders* holds that an appointed attorney must advocate his client's case vigorously and may not withdraw from a nonfrivolous appeal. *Jones*, 463 U.S. at 749; *Laffosse* v. *Walters*, 585 F. Supp. 1209, 1213 (S.D.N.Y. 1984); *People* v. *Barton*, 132 A.D.2d 1000, 518 N.Y.S.2d 286 (1987). By way of dictum, the Court did indicate that when counsel believes the appeal is "wholly frivolous," counsel may move to withdraw. Counsel's motion must be accompanied by a brief referring to anything in the record that might arguably support the appeal. *Anders*, 386 U.S. at 744.[4] However, it is important to recognize that the court's dictum is inapplicable to this case.

[4] The Court's dictum has generated criticism that the procedure is inconsistent in that it requires the attorney who concludes an appeal is frivolous to file a brief raising errors that arguably support the appeal, or, in other words, to "brief the unbriefable." *See, e.g.*, STANDARDS RELATING TO CRIMINAL APPEALS § 3.2 commentary at 78 (Approved Draft 1970); *Commonwealth* v. *Moffett*, 383 Mass. 201, 205-06, 418 N.E.2d 585, 590 (1981). The confusion, which is evidenced by the state appellate court's action herein, appears to stem from the lower courts' failure to distinguish between an appeal that is wholly frivolous and one that is arguable but lacks merit. The Court need not be detained by this problem, however, because, as will be shown below, Penson's appeal was not frivolous and contained arguable nonfrivolous issues. To the extent the Court feels compelled to address this problem, Penson suggests that a clear definition of what constitutes a "frivolous" appeal would greatly assist in clearing up the confusion. Simply put, the Court could define a frivolous appeal as one containing no issue on which a rational argument on the law or facts can be made, see *Coppedge* v. *United States*, 369 U.S. 438, 448 (1962), and only permit motions to withdraw in those situations. *See Anders*, 386 U.S. at 746, Justice Stewart, dissenting. Of course, the court would be required to conduct an independent review of the record to determine if it agrees with counsel's conclusion as to frivolity, which should be presented in lawyer-like fashion showing counsel's thorough analysis of the issues in the case. *See Anders*, at 744-45. In all other cases, a brief on the merits would be required. It is submitted that this clarification of the *Anders* procedure would better promote the goals of fair and reliable decision-making on appeal and vigorous and effective advocacy that underlies *Anders*. *See Jones*, 463 U.S. at 754. For a more complete discussion of this problem, see the *Amicus Curiae* Brief of the Ohio Association of Criminal Defense Lawyers in support of petitioner at § III.

First, the Ohio Court of Appeals specifically found that Penson's appeal was nonfrivolous by acknowledging the presence of arguable issues. (J.A. 41). Secondly, Penson received the same treatment from his counsel and the state appellate court as Anders did. His counsel should not have been permitted to withdraw. After reviewing the record, Penson's counsel filed a "Certification of Meritless Appeal," see J.A. 35, stating that he found "no errors requiring reversal, modification, and/or vacation" of Penson's convictions or sentences and "that he will not file a meritless appeal" on Penson's behalf. Counsel's certification was accompanied by a motion to withdraw. *See* J.A. 35-36. Counsel's standard for providing representation, which the lower court sanctioned, was actually higher than that of Anders' counsel. Penson's counsel refused to represent him because the appeal was not a clear winner and not simply because it lacked merit. Without determining that Penson's appeal was frivolous, or requesting a brief, the Ohio Court of Appeals granted counsel's motion to withdraw a week after it was filed. (J.A. 37). The Court indicated it would independently review the record for reversible error at a later time. *Id.* The Court subse-

quently denied Penson's request for appointment of another attorney. (J.A. 40).

The Ohio Court of Appeals thereafter found that it was troubled by counsel's filing of an "*Anders* brief"[5]; that counsel's conclusion that there were no errors which could arguably support the appeal was "highly questionable" due to the "considerable briefs" filed by Penson's co-defendants; and that the record did support several arguable claims. (J.A. 41). Indeed, the Court reversed one of Penson's convictions. (J.A. 41-42). Therefore, the Court specifically found the appeal was meritorious and improperly permitted Penson's counsel to withdraw in violation of *Anders*.

Even assuming Penson's counsel had stated that the appeal was frivolous, *Anders* still required him to file a brief. The no merit letter "affords neither the client nor the court any aid." *Anders*, 386 U.S. at 745.

> "The former must shift entirely for himself while the court has only the cold record which it must review without the help of an advocate."

Id. at 745. Unless counsel properly performs as an advocate there cannot be an adequate and effective review of the accused's conviction. Counsel's role as an advocate requires, at a minimum, that counsel review the record and submit a thorough, lawyer-like brief that reflects his conscientious examination of the facts and law in the case. *Nell* v. *James*, 811 F.2d 100, 104 (2nd Cir. 1987). *Nickols* v.

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[5] The Ohio Court of Appeals characterization of counsel's filing as an "*Anders* brief" is inaccurate. Counsel's "certification of meritless appeal" was nothing more than a "no-merit" letter which was condemned in *Anders*.

Gagnon, 454 F.2d 467, 471 (7th Cir. 1971), *cert. denied*, 408 U.S. 925 (1972).

Moreover, *Anders* requires that counsel be appointed once the court determines there are arguable issues:

> ". . . if [the court] finds any of the legal points arguable on their merits [and therefore not frivolous] it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal."

Anders, 386 U.S. 744. *Accord Nell*, 811 F.2d at 103; *State* v. *Causey*, 503 So.2d 321 (Fla. 1987); *People* v. *Wende*, 25 Cal.3d 436, 600 P.2d 1071, 158 Cal. Rptr. 839 (1979). The Ohio Court of Appeals did not appoint counsel for Penson.

The Ohio Court of Appeals further violated *Anders* by finding Penson was not prejudiced by counsel's nonperformance. (J.A. 40-41). *Anders* does not require a specific showing of prejudice when counsel files a no-merit letter. In fact, the *Anders* Court ordered a new appeal despite the dissent's contention that there was no arguable issue to present. *See Anders*, 386 U.S. at 746, Justice Stewart, dissenting. Permitting the court of appeals to deny counsel under a "no prejudice" standard is similar to allowing the trial court to deny counsel because the defendant would have been found guilty anyway. The United States Constitution requires more.

Justice (then Judge) Stevens in *Nickols* v. *Gagnon*, 454 F.2d at 470, captured the essence of why a no-merit letter procedure like that used in Penson's case is not constitutionally adequate:

> Anders forcefully argued that the conclusory no merit letter which his lawyer had prepared provided the Court with no assistance whatsoever in making its review of the record, and of particular significance, no assurance that the lawyer had, in fact,

> discharged his obligation to his client in a competent and professional manner. The danger that a busy or inexperienced lawyer might opt in favor of a one sentence letter instead of an effective brief in an individual marginal case is real, notwithstanding the dedication that typifies the profession. If, however, counsel's ultimate evaluation of the case must be supported by a written opinion "referring to anything in the record that might arguably support the appeal," 386 U.S. at 744, 87 S.Ct. at 1400, the temptation to discharge an obligation in summary fashion is avoided, and the reviewing court is provided with meaningful assistance.

Accord High v. *Rhay*, 519 F.2d 109, 112 (9th Cir. 1975).

Because the Ohio Court of Appeals violated *Anders* and refused to afford Penson counsel to argue his nonfrivolous appeal, it unconstitutionally sanctioned appellate counsel's usurpation of Penson's right to appeal. *See Jones* v. *Barnes*, 463 U.S. at 754-55, Justice Blackmun, concurring ("certainly *Anders* . . . indicate[s] that the attorney's usurpation of certain fundamental decisions can violate the Constitution"). The *Anders* procedures were designed to protect the accused's underlying constitutional right to counsel on direct appeal. *Pennsylvania* v. *Finley*, 481 U.S. ___, 95 L.Ed.2d 539 (1987). If *Anders* is not adhered to, the right to counsel is lost. This case is a graphic illustration of that principle.

The requirement that appellate counsel play the role of an active advocate was again reaffirmed in *Jones* v. *Barnes*, 463 U.S. at 754. The Court held that appellate counsel was not required to raise every "colorable" claim requested by the client as it would "disserve the very goal of vigorous and effective advocacy that underlies *Anders*." *Id.* However, counsel is expected to exercise his best professional judgment and choose the issues that will

best support the appeal. No reasonable professional judgment can support an attorney's decision to totally abandon his client and raise no issues in a nonfrivolous appeal. *Laffosse* v. *Walters*, 585 F. Supp. 1209, 1214 (S.D.N.Y. 1984) ("Although assigned counsel may exercise his professional judgment and decide not to raise and argue some nonfrivolous issues, counsel must nevertheless prosecute a nonfrivolous appeal"); *accord People* v. *Barton*, 132 A.D.2d ___, 518 N.Y.S.2d at 287. It is the very antithesis of vigorous and effective advocacy.

More recently, in *Evitts* v. *Lucey*, 469 U.S. at 387, the Court recognized the right to effective assistance of appellate counsel. The Court emphasized that appellate counsel must provide adequate assistance to the defendant if he is to obtain a fair decision on the merits. *Id.* at 395. The Court stated that counsel

> ". . . must be available to assist in preparing and submitting a brief to the appellate court . . . and must play the role of an active advocate, rather than a mere friend of the court assisting in a detached evaluation of the appellant's claim. *See Anders* v. *California*, 386 U.S. 738 . . . *Entsminger* v. *Iowa*, 386 U.S. 748 (1967)."

Id. at 394. *Evitts* further reaffirmed *Anders'* minimum constitutional requirement that appellate counsel must file a brief:

> A first appeal as of right therefore is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney. This result is hardly novel. The [petitioner] in . . . *Anders* v. *California*, 386 U.S. 738, 18 L.Ed.2d 493, 87 S.Ct. 1396 (1967) . . . claimed that, although represented in name by counsel, [he] had not received the type of assistance constitutionally required to render the appellate proceedings fair. In [that case], we agreed

> with the [petitioner], holding that *counsel's failure in Anders to submit a brief on appeal . . . rendered the subsequent [judgment] against the petitioner unconstitutional.* (Emphasis added).

Id. at 396-97.

The *Evitts* Court was simply recognizing the obvious. "The services of a lawyer will for virtually every layman be necessary to present an appeal in a form suitable for appellate consideration on the merits." *Id.* at 393.

> "Our cases dealing with the right to counsel-whether at trial or on appeal-have often focused on the defendant's need for an attorney to meet the adversary presentation of the prosecutor. *See*, e.g., *Douglas* v. *California*, 372 U.S. 353. . ."

Id. at 394 n. 6. It is axiomatic that counsel cannot be an advocate on appeal if he does not file a brief. It is the primary vehicle by which the defendant's claims of error are presented to the appellate court. Thus, "a brief is a necessity." R. STERN, *APPELLATE PRACTICE IN THE UNITED STATES* §7.2 at 210 (1981) (quoting Judge Charles E. Clark of the Second Circuit).

> "There must be a brief, to summarize the evidence, to set out the record references, to collect citations, to discuss the authorities - to do all that oral argument cannot do and at the same time to buttress and support and substantiate the impression made by oral argument."

Id. at 210-11 [quoting F. WIENER, *BRIEFING AND ARGUING FEDERAL APPEALS* 32 (1967)].

As stated by Judge Goodrich of the Third Circuit:

> It is hard to overstate the importance of the brief on an appeal. Oral argument . . . is made only once in nearly all instances and it is inevitable that some of its effect will be lost in the interval between the time

> the argument is made and the court opinion appears . . . . [T]he brief speaks from the time it is filed and continues through oral argument, conference, and opinion writing . . . *Certain it is that the brief is the most important thing about an appeal* . . . (Emphasis added).

Id. at 211.

In *Mylar* v. *Alabama*, 671 F.2d 1299 (11th Cir. 1982) *cert. denied*, 463 U.S. 1229 (1983), the Eleventh Circuit stated the importance of appellate counsel's advocacy in a brief:

> As an active advocate, appellate counsel is duty bound to affirmatively promote his client's position before the court. Such a duty not only requires counsel to inform the court of errors committed at trial but additionally mandates that counsel provides legal citations and reasoning to support any claim for relief. Unquestionably a brief containing legal authority and analysis assists an appellate court in providing a more thorough deliberation of an appellant's case.

Id. at 1301.

J. PURVER & LAWRENCE TAYLOR, *HANDLING CRIMINAL APPEALS* §5 at 10-11 (1980), aptly stated appellate counsel's constitutional responsibility to file a brief:

> Inherent in appellate counsel's duty to be an effective advocate for his or her client is the responsibility to present effective written argument. The failure to submit on time an acceptable written brief on behalf of a client is deplorable professional conduct, recognized as ineffective representation amounting to denial of counsel. . .

As recognized in *Anders*, 386 U.S. at 738, counsel's written advocacy is necessary to assist the court in deciding the appeal. *United States* v. *Edwards*, 777 F.2d 364 (7th

Cir. 1985); *Nell*, 811 F.2d at 104. In *Johnson* v. *United States*, 360 F.2d 844, 845 (D.C. Cir. 1966), the court stated that it could not determine whether counsel's conclusions that the appeal was frivolous or without merit were correct in absence of a brief. In a concurring opinion, former Chief Justice (then Judge) Burger stated that even when counsel concludes that the appeal is hopeless, "court-appointed counsel performs an important function." *Id.* at 846. Counsel does so by making sure that the reviewing court understands all the salient facts, the critical issues, and all the relevant legal authorities before making a final decision. *Id.* The former Chief Justice further opined:

> Counsel whose motion [to withdraw] we now deny must remember that under our adversary system an appellate court cannot function efficiently without lawyers to present whatever there is to be said on behalf of an appellant, however meager his claims may be, so that the Court can make an informed appraisal.

Id. at 847. The American Bar Association Project on Standards for Criminal Justice concur:

> "The court's processes will be aided, not impeded, if a trained legal mind has been applied to presentation of the issues. This consideration surely underlies the Supreme Court's position in *Anders*."

STANDARDS RELATING TO THE DEFENSE FUNCTION § 8.3(b) commentary at 299-300 (Approved Draft 1971).

Since counsel's written advocacy in a brief is vital to the appeal, its absence in Penson's case renders counsel's representation nominal at best. But as this Court said in *Evitts*, 469 U.S. at 396:

> ". . . nominal representation on an appeal as of right-like nominal representation at trial-does not suffice to render the proceedings constitutionally adequate; a party whose counsel is unable to provide effective representation is in no better position than one who has no counsel at all."

It is for this reason that the *Anders* requirement that an adequate brief be filed has been upheld by the federal courts of appeal for the Second, Sixth, Seventh, Eighth, Ninth, Eleventh, and District of Columbia Circuits without a showing of prejudice.[6] In *Cannon* v. *Berry*, 727 F.2d 1020 (11th Cir. 1984), the Eleventh Circuit considered whether a showing of prejudice was required to find ineffective assistance of appellate counsel where counsel fails to file a brief. The Court found that counsel's failure was the functional equivalent of having no counsel at all. *Id.* at 1023. The Court reasoned:

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[6] See *Jenkins* v. *Coombe*, 821 F.2d 158 (2nd Cir. 1987), *cert. denied*, ___ U.S. ___, 98 L.Ed.2d 655 (1988); *Passmore* v. *Estelle*, 607 F.2d 662 (5th Cir. 1979), *cert. denied*, 446 U.S. 937 (1980) (Counsel's submission of one-sentence brief denied accused effective assistance since counsel did not act as advocate); *Freels* v. *Hills*, ___ F.2d ___, No. 87-3016, slip op. (6th Cir. April 6, 1988); *United States* v. *Edwards*, 777 F.2d 364 (7th Cir. 1985) (Court denied counsel's motion to withdraw since he did not identify in his one-page "brief," which was a "no merit" letter, any issues in the record that might conceivably be appealable); *Smith* v. *United States*, 384 F.2d 649 (8th Cir. 1967) (Permission to withdraw could not be granted due to counsel's failure to submit a brief referring to anything in the record that might be argued on appeal); *Cannon* v. *Berry*, 727 F.2d 1020 (11th Cir. 1984); and *Mylar* v. *Alabama*, 671 F.2d 1299 (11th Cir. 1982), *cert. denied*, 463 U.S. 1229 (1983); *Robinson* v. *Black*, 812 F.2d 1084 (8th Cir. 1987) (Appellate counsel's brief inadequate where he briefed all issues in favor of government and concluded appeal was meritless.); *High* v. *Rhay*, 519 F.2d 109 (9th Cir. 1975); *Suggs* v. *United States*, 391 F.2d 971 (D.C. Cir. 1968) (Counsel's brief which stated that there was no substance to the appeal does not satisfy *Anders*); *see also Laffosse* v. *Walters*, 585 F. Supp. 1209 (S.D.N.Y. 1984). *Cf. Griffin* v. *West*, 791 F.2d 1578 (10th Cir. 1986); *Lockhart* v. *McCotter*, 782 F.2d 1275 (5th Cir. 1986), *cert. denied*, ___ U.S. ___, 93 L.Ed.2d 827 (1987).

> "If a petitioner like Cannon had to show actual prejudice from the dismissal of his direct state appeal, notwithstanding his failure to follow the *Anders* procedures, there would be a considerable erosion in the enforcement of *Anders*."

Id. at 1024. In other words, the right to the assistance of counsel on appeal could effectively be denied absent a showing of prejudice by the defendant. This is obviously a task as difficult for the accused as representing himself on appeal.

The Eleventh Circuit relied upon its decision in *Mylar* v. *Alabama*, 671 F.2d at 1302, which held that counsel's failure to file a brief on appeal constituted ineffective assistance of counsel. The Court found that the duties of an "active advocate" mandate that appellate counsel assert his client's position in a brief. Independent review by the court is no substitute. *Id.*

> "A brief sets forth a partisan position and contains legal reasoning and authority supporting the defendant's position. The mere fact that appellate courts are obliged to review the record cannot be considered a substitute for the legal reasoning and authority typically found in a brief."

Id.

Similarly, in *Freels* v. *Hills*, ___ F.2d ___, No. 87-3016, slip op. (6th Cir. April 6, 1988), appellate counsel filed a brief stating that the "trial court had committed no error prejudicial to the defendant." *Id.* at 9. The Sixth Circuit refused to require a showing of prejudice because appellate counsel failed to file an adequate brief in compliance with *Anders:*

> Although it might be easy for us to conclude that, faced with a very abbreviated and uncontroverted record, both Freel's counsel and the Ohio Court of Appeals committed no error, we believe that the absence of any evidence of advocacy in the role of appellate counsel presumptively places such a conclusion in serious doubt and vindicates the wisdom of *Anders* . . . If we were to allow the absence of viable issues on appeal to serve as an excuse for counsel's failure to follow the mandates of *Anders*, we would be effectively erasing *Anders* from the books altogether.

Id. at 12-13. *Accord Jenkins* v. *Coombe*, 821 F.2d 158 (2nd Cir. 1987), *cert. denied*, ___ U.S. ___, 98 L.Ed.2d 655 (1988) (rejecting application of a prejudice test when counsel filed an inadequate brief and withdrew from appeal).

In *High* v. *Rhay*, 519 F.2d at 109, the Ninth Circuit found appellate counsel ineffective when he filed an inadequate brief containing no statement of facts, stating the simple question of the sufficiency of evidence, and inviting the court to review the trial transcript. The court said the brief was "worthless" and that "no client in his right mind would pay one cent for such a performance." *Id.* at 113. The court further held that even though High's appeal would probably be affirmed, even if he were represented by adequate counsel,

> [n]evertheless, High has a right to have an advocate present his case to the Washington Court of Appeals. *Under our adversary system, it has become a well-established principle that there is no substitute for counsel who acts as an advocate and who makes the best argument he can on the facts and the law. Anders* v. *California* (citation omitted). The appellant may not be deprived of the benefit of such appellate representation because his court-appointed counsel fails to perform his clear duty.

Id. at 113.

A number of state courts have also found that appellate counsel's failure to file an adequate brief on appeal constitutes ineffective assistance without a showing of prejudice.[7]

As recognized by the Washington Court of Appeals in *Matter of Frampton*, 45 Wash. App. 554, 560, 726 P.2d 486, 490 (1986), in determining whether prejudice must be shown, the important question is not whether the petitioner was provided some form of appeal by the appellate court. Rather, "the important question is whether the [accused] was afforded an appeal in a constitutional sense." *Id.* The Court concluded that an appellate attorney's failure to present any issues in a brief is tantamount to a denial of his right to appeal which is prejudical per se. *Id.* Thus, where, as here, the defendant is deprived of his right to a complete and effective review of his conviction, he should not be required to demonstrate he was prejudiced or would have prevailed on the appeal.

III. UNDER *STRICKLAND* V. *WASHINGTON*, 466 U.S. 668 (1984), AND *UNITED STATES* V. *CRONIC*, 466 U.S. 648 (1984), STANDARDS FOR INEFFECTIVE ASSISTANCE OF COUNSEL, PREJUDICE MUST BE PRESUMED WHEN APPELLATE COUNSEL IS DENIED OR COUNSEL FAILS TO FILE A BRIEF.

In *Strickland* v. *Washington*, 466 U.S. 668 (1984), and *United States* v. *Cronic*, 466 U.S. 648 (1984), the Court

[7] *Matter of Frampton*, 45 Wash. App. 554, 560, 726 P.2d 486, 490 (1986) (failure to raise any issues in brief); *Ex Parte Dunn*, 514 So.2d 1300 (Ala. 1987) (failure to file brief); *People* v. *Gonzalez*, 47 N.Y.2d 606, 393 N.E.2d 987, 419 N.Y.S.2d 913 (1979) (failure to raise any issues in brief); *People* v. *Casiano*, 67 N.Y.2d 906, 492 N.E.2d 1224, 501 N.Y.S.2d 808 (1986) (failure to analyze issues presented by record in brief); *In Re Spears*, 157 Cal. App.3d 1203, 204 Cal. Rptr. 333 (1984) (brief raised no arguable issues); *Carroll* v. *State*, 468 So.2d 186 (Ala. Crim. App. 1985) (failure to file brief); *Loop* v. *Solem*, 398 N.W.2d 140 (S. D. 1986) (failure to file brief).

set standards for determining whether trial counsel rendered ineffective assistance. In doing so the Court acknowledged the vital role counsel plays that is critical to the ability of the adversarial system to produce just results. *Strickland*, 466 U.S. at 685.

> "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free."

Cronic, 466 U.S. at 655 [(quoting *Herring* v. *New York*, 422 U.S. 853, 862 (1975)]. The Court stated that counsel must be reasonably competent and supply advice that is "within the range of competence demanded of attorneys in criminal cases." *Id.* at 655. The Court further defined counsel's constitutional role as an advocate:

> Thus, the adversarial process protected by the Sixth Amendment requires that the accused have "counsel acting in the role of an advocate." *Anders* v. *California*, 386 U.S. 738 . . . The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted-even if defense counsel may have made demonstrable errors-the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated.

Id. at 656-57. Thus, the Court indicated that the benchmark for judging any claim of ineffectiveness must be "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686. To meet this test, an accused in most cases must show that counsel's performance was deficient and that it prejudiced the defense. *Id.* at 687. However,

the Court identified two situations where prejudice to the accused would be presumed:

> There are, however, circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified. Most obvious of course, is the complete denial of counsel. The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial. Similarly, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of the Sixth Amendment rights that makes the adversary process itself presumptively unreliable.

Cronic, 466 U.S. at 659; *Strickland*, 466 U.S. at 692; *accord Kimmelman*, 477 U.S. at ___, 91 L.Ed.2d at 332-33 n. 2, Justice Powell, concurring.

Application of the above principles to appellate proceedings[8] requires the conclusion that counsel's failure to file a brief and withdrawal from the appeal violates due process. Such action is not within the range of competence expected of appellate attorneys. *See, e.g.*, STANDARDS FOR CRIMINAL JUSTICE: THE DEFENSE FUNCTION § 4-8.3 (Approved Draft 1979). ("Appellate counsel should

[8] *See*, e.g., *Smith* v. *Murray*, 477 U.S. ___, 91 L.Ed.2d 434 (1986), where this Court applied a *Strickland* prejudice test to counsel's failure to raise a particular issue on appeal. A number of federal circuits have also used the *Strickland* standards for judging the performance of appellate counsel. *See Bowen* v. *Foltz*, 763 F.2d 191 (6th Cir. 1985); *Gray* v. *Greer*, 778 F.2d 350 (7th Cir. 1985), *vacated on other grounds*, ___ U.S. ___, 92 L.Ed.2d 734 (1986); *see also Cannon*, 727 F.2d at 1023-24; *Freels*, No. 87-3016, slip op. at 1, 9; *Jenkins*, 821 F.2d at 161; *Griffin* v. *West*, 791 F.2d 1578 (10th Cir. 1986); and *Lockhart* v. *McCotter*, 782 F.2d 1275 (5th Cir. 1986), *cert. denied*, ___ U.S. ___, 93 L.Ed.2d 827 (1987), discussed in text below.

not seek to withdraw from a case solely on the basis of his or her own determination that the appeal lacks merit"). First, as the Court noted in *Evitts*, 469 U.S. at 396, the accused must face an adversary proceeding on appeal similar to that at trial. He is in need of an attorney to face the adversary presentation of the prosecutor. *Id.* at 394 n. 6. Moreover, counsel must act as a "sword" on appeal to upset the conviction. He must be more of an active advocate for his client than at trial where he acts as a "shield." *See Ross* v. *Moffitt*, 417 U.S. 600, 610-11 (1974). When counsel has not advocated his client's claims in a brief, he is effectively absent from the proceedings. The "sword" has not been unsheathed.

Secondly, counsel who fails to file a brief has not played the role of an advocate and participated in the adversarial process. To be sure, counsel's nonperformance precludes the process from occurring. If counsel's presence is essential to a fair and reliable result, his absence must be presumptively prejudicial. Counsel was absent here. Penson's counsel not only failed to file a brief, he withdrew leaving Penson without counsel on appeal. This Court's analysis in *Evitts*, 469 U.S. at 395, is relevant:

> "In a situation like that here, counsel's failure was particularly egregious in that it essentially waived respondent's opportunity to make a case on the merits; in this sense, it is difficult to distinguish respondent's situation from that of someone who had no counsel at all. *Cf. Anders* v. *California*, 386 U.S. 738. . ."

See Barnes v. *Jones*, 665 F.2d 427, 437 (2nd Cir. 1981), *rev'd* 463 U.S. 745 (1983) (Judge Meskill, dissenting) (*Anders*' counsel's "complete refusal to brief and argue claims left the defendant totally without the aid of counsel in pressing his appeal").

Accordingly, under *Strickland* and *Cronic* principles, Penson's counsel's action was presumptively prejudicial. As indicated above, the Second, Sixth, and Eleventh Circuits agree that counsel's failure to file an adequate brief is presumptively prejudicial under *Strickland* standards. *Cannon* v. *Berry*, 727 F.2d 1020 (11th Cir. 1984); *Freels* v. *Hills*, ___ F.2d ___, No. 87-3016, slip op. (6th Cir. April 6, 1988); *Jenkins* v. *Coombe*, 821 F.2d 158 (2nd Cir. 1987), *cert. denied*, ___ U.S. ___, 98 L.Ed.2d 655 (1988).

In *Jenkins* v. *Coombe*, 821 F.2d at 159-60, appellate counsel filed an inadequate brief and then withdrew from the appeal. The state contended that Jenkins should be required to show prejudice under *Strickland* standards. The Court rejected this argument and found counsel's action presumptively prejudicial:

> We think that the *Strickland* [prejudice] test is inapplicable in the circumstances of this case because Jenkins had no counsel or, at best nominal counsel to represent his interests on the state appeal. *Evitts*, 469 U.S. at 396, 105 S.Ct. at 836. *The test makes sense only when a defendant has an attorney assigned or retained to take charge of his defense.* Here, Jenkins appointed attorney was removed before his appeal was submitted to the appellate court for decision, and no replacement was ever assigned. (Emphasis added).

Id. at 161.

The Fifth and Tenth Circuits have reached a different conclusion. *See Griffin* v. *West*, 791 F.2d 1578 (10th Cir. 1986); *Lockhart* v. *McCotter*, 782 F.2d 1275 (5th Cir. 1986) *cert. denied*, ___ U.S. ___, 93 L.Ed.2d 827 (1987). However, their analysis is suspect. Both *Griffin* and *Lockhart* analyzed counsel's failure to file a brief under *Strickland's*, 466 U.S. at 686, "deficient performance" standards, which requires a showing of prejudice. *Griffin*, at 1582; *Lockhart*, at 1283. Neither court considered the presumption of prejudice analysis addressed above which more appropriately applies when counsel's performance is effectively denied. Thus, when counsel fails to file a brief, it is not a "deficient performance," it is "no performance." No performance by counsel is the functional equivalent of having no counsel. This is clearly distinguishable from a "deficient performance" situation where counsel files a brief but does not raise a particular issue. *Galloway* v. *Stephenson*, 510 F. Supp. 840, 844 n.4 (M.D. N.C. 1981). Therefore, Penson submits that the "presumption of prejudice" approach of the Second, Sixth, and Eleventh Circuits in this situation more accurately reflects the intent of *Strickland*. *Accord Ex Parte Dunn*, 514 So.2d at 1303-04 (counsel's failure to file a brief constitutes "actual or constructive denial of assistance of counsel" and *Strickland* requires no showing of prejudice).

In *Cronic*, 466 U.S. at 659 n. 25, the Court also noted the cases where it had "uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceedings." *See Geders* v. *United States*, 425 U.S. 80 (1976) (denial of counsel during overnight recess between defendant's direct and cross-examination); *Herring* v. *New York*, 422 U.S. 853 (1975) (denial of closing argument by counsel); *Brooks* v. *Tennessee*, 406 U.S. 605, 612-13 (1972) (statute requiring defendant to testify before any other defense witnesses deprives defendant of "guiding hand of counsel" in presentation of defense); *Hamilton* v. *Alabama*, 368 U.S. 52 (1961) (denial of counsel at arraignment); *White* v. *Maryland*, 373 U.S. 59 (1963) (denial of counsel at preliminary hearing/arraignment); *Ferguson* v. *Georgia*, 365

U.S. 570 (1961) (counsel not allowed to ask questions of client in unsworn statement); *Williams* v. *Kaiser*, 323 U.S. 471, 475-76 (1945) (counsel denied to defendant who later plead guilty).

These cases amply demonstrate that this Court will not tolerate any significant interference with or denial of counsel's assistance at trial-level proceedings. *Cf. United States* v. *Morrison*, 449 U.S. 361 (1981) (pre-trial Sixth Amendment violation resulted in no prejudice to counsel's ability to provide adequate representation). By the same token, this Court should not permit appellate counsel or a state appellate court on direct appeal to completely deny an accused any assistance by counsel. It is certainly as egregious a violation of the right to counsel as the examples cited above, if not more so.

IV. THE OHIO COURT OF APPEALS' INDEPENDENT REVIEW OF THE RECORD AND CONSIDERATION OF THE ISSUES RAISED IN PENSON'S CO-DEFENDANTS' APPEALS DID NOT RENDER THE DENIAL OF THE RIGHT TO COUNSEL NON-PREJUDICIAL OR AFFORD HIM THE ADEQUATE AND EFFECTIVE REVIEW TO WHICH HE WAS ENTITLED.

The lower court found that Penson was not prejudiced by his counsel's withdrawal from the appeal because it had examined the record and considered the errors raised in the co-defendants' appeals.[9] (J.A. 40-44). The court's

[9] From the Court's opinion, see J.A. 38, one is unable to determine whether the court was applying a *Chapman* v. *California*, 386 U.S. 18 (1967), "harmless error" standard or a *Strickland*, 466 U.S. 668, "prejudice" standard. While both are "outcome determinative" standards, they are substantially different in terms of who bears the burden of proof. Chapman requires the state to bear the burden of proving beyond a reasonable doubt that the error did not contribute to the result, *Chapman*, 386 U.S. at 24; whereas *Strickland*, 466 U.S. at 694, requires the accused to show that there is a reasonable probability that the result would have been otherwise if counsel's performance had not been deficient. Who bears the burden of proof on as important an issue as the right to counsel can obviously make a difference as to whether the accused gets counsel. *Cf. Speiser* v. *Randall*, 357 U.S. 513, 525 (1958). Penson was entitled to know by what standard the court was judging the denial of counsel and the court's failure to identify it denies due process.

action did not remedy the denial of counsel or afford him the adequate and effective review to which he was entitled.

This Court, in a long line of cases, has guaranteed that indigents have an adequate opportunity to present their claims fairly within the appellate adversary system. *Ross* v. *Moffitt*, 417 U.S. at 612; *see also Griffin* v. *Illinois*, 351 U.S. 12 (indigent has right to free transcript); *Entsminger* v. *Iowa*, 386 U.S. 748 (1967) (indigent's right to entire record on appeal); *Draper* v. *Washington*, 372 U.S. 487 (1963) (indigent's right to a transcript to challenge trial court's finding of frivolity); *Eskridge*, 357 U.S. 214 (1958) (right to a free transcript despite judge's finding trial was error free); *Burns* v. *Ohio*, 360 U.S. 252 (1959) (indigent's right to waiver of filing fees). As demonstrated above, the right to effective counsel is essential to the appellate process to insure that the accused's claims are "meaningfully" presented. *Douglas*, 372 U.S. at 358, *Evitts*, 469 U.S. at 397. When the right to counsel has been denied, this court has not inquired into the merits of the appeal before reversing. *Evitts*, 469 U.S. at 387.

In *Douglas*, *Swenson*, and *Anders*, the state courts had reviewed the records and concluded that there was no merit to the appeals. The Court's reversals in these cases reflect a recognition that the accused receives a substan-

tial benefit from appellate counsel's advocacy and that appellate issues cannot be fairly decided without it. *See Douglas*, 372 U.S. at 358 (indigent benefits from counsel's examination of record, research of law, and marshalling of arguments in his behalf); *Swenson*, 386 U.S. at 259 (counsel's discussion in brief of claims of error and citation of relevant portions of transcript benefit the defendant); *Anders*, 386 U.S. at 745 (no-merit letter affords client nor court any aid, requiring the client to shift for himself while the court has only the cold record which it must review without the help of an advocate). *See also Rodriguez* v. *United States*, 395 U.S. 327 (1969) (Court refused to apply a harmless error rule to the denial of an appeal because there was no reason to add an additional hurdle to those whose initial right to appeal had been frustrated); *United States ex rel. Williams* v. *LaValle*, 487 F.2d 1006 (2nd Cir. 1973), *cert. denied*, 416 U.S. 916 (1974) (underlying merits have no bearing on the question of restoring fundamental appellate rights where they have been wrongfully denied); *Hollis* v. *United States*, 687 F.2d 257 (8th Cir. 1982), *cert. denied*, 465 U.S. 1036 (1984) (prejudice need not be shown where counsel ineffective); *accord Robinson* v. *Wyrick*, 635 F.2d 757, 758 (8th Cir. 1981).

Independent review of the record by the court cannot adequately substitute for the assistance counsel provides his client and the court. *Mylar*, 671 F.2d at 1302; *Jenkins*, 821 F.2d at 161; *Johnson*, 360 F.2d at 846.

Moreover, the function of our appellate courts is to judge, not advocate issues. Busy appellate judges cannot be expected to peruse the record for errors as an advocate does and fashion an argument for them based on the pertinent law and facts. As this Court knows, legal arguments on some issues are quite involved and develop only

after extensive legal research. It is sheer folly to suggest that judges reviewing records will routinely think of them or that they should be required to. That is counsel's role. There is no adequate substitute for it. As the New York Court of Appeals observed in *People* v. *Gonzalez*, 47 N.Y.2d 606, 611, 393 N.E.2d 987, 991, 419 N.Y.S.2d 913, 916 (1979):

> "Appellate counsel not infrequently advance contentions which might otherwise escape the attention of judges of busy appellate courts, no matter how conscientiously and carefully those judges read the records before them. (*People* v. *Emmett*, 25 N.Y.2d 354, 356, 254 N.E.2d 744, 745, 306 N.Y.S.2d 433, 435, supra)."

Indeed, even attorneys sometimes fail to raise meritorious issues and procedurally default them. *See Murray* v. *Carrier*, 477 U.S. ___, 91 L.Ed.2d 397 (1986); *Smith* v. *Murray*, 477 U.S. ___, 91 L.Ed.2d 434 (1986); *Engle* v. *Isaac*, 456 U.S. 107 (1982).

Nor can the right to counsel be satisfied vicariously through another appellate attorney's representation of a co-defendant. The right to counsel is a personal right and can only be satisfied by counsel representing the accused's personal interests. *See Kimmelman*, 477 U.S. ___, 91 L.Ed.2d at 331 (1986), Justice Powell, concurring (". . . the right to effective assistance of counsel is personal to the defendant and is explicitly tied to the defendant's right to a fundamentally fair trial . . ."). As Justice Black wrote in *Von Moltke* v. *Gillies*, 332 U.S. 708, 725 (1948):

> "The right to counsel guaranteed by the Constitution contemplates the services of an attorney devoted solely to the interests of his client. *Glasser* v. *United States*, 315 U.S. 60, 70."

Counsel representing a co-defendant simply does not do that. In this case, Penson's co-defendants' attorneys did not represent his interests on appeal or present errors on his behalf.

Like a trial, an appeal may present a number of possible claims, some unique to each defendant. *See Engle*, 456 U.S. at 133; *Murray*, 477 U.S. at ____, 91 L.Ed.2d at 407. The Court has recognized that the hallmark of effective appellate advocacy is to "winnow out" the weaker issues and focus on the stronger ones. *Jones*, 463 U.S. at 751-52; *Smith*, 477 U.S. ____, 91 L.Ed.2d at 445. Because appellate advocacy is an art, attorneys will evaluate the merits of an appeal and the issues it presents differently. As a result, attorneys for co-defendants will often not argue the same issues. This case is a good example. Counsel for Richard Brooks, one of Penson's co-defendants, raised six issues on Brooks' appeal while counsel for John Smith raised only three for him, only one of which was the same as any issue raised by Brooks. *See State* v. *Brooks* (June 4, 1987), Montgomery App. No. 9190, unreported; *State* v. *Smith* (May 13, 1987), Montgomery App. No. 9168, unreported; *State* v. *Smith* (June 5, 1987), Montgomery App. No. 9168, unreported (Amended Opinion.)[10] If Penson had had effective counsel, counsel may have very well raised different issues on his appeal. Therefore, it is fundamentally unfair to deprive him of his personal right to counsel on appeal.

Similarly, it is not uncommon for attorneys to fail to raise, or procedurally default, issues on appeal. *See Murray*, 477 U.S. ____, 91 L.Ed.2d 397; *Smith* 477 U.S. ____, 91 L.Ed.2d 434; *Engle*, 456 U.S. 107.

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[10] These decisions have been lodged with the Clerk.

> "It will often be the case that even the most informed counsel will fail to anticipate a state appellate court's willingness to reconsider a prior holding or will underestimate the likelihood that a federal habeas court will repudiate an established state rule."

Murray, 477 U.S. at ____, 91 L.Ed.2d at 445. If co-counsels' representation is considered constitutionally adequate, Penson would be bound by their mistakes. *See, e.g., Murry*, 477 U.S. at ____, 91 L.Ed.2d at 411. Fairness requires that the state provide Penson with his own attorney before it summarily enforces procedural defaults against him. *See id.* at 408. ("So long as a defendant is represented by counsel whose performance is not constitutionally ineffective . . . we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default").

In *Jenkins* v. *Coombe*, 821 F.2d at 158, the Second Circuit considered a situation where the accused was without counsel on appeal when his attorney withdrew after filing an inadequate brief. The accused filed a *pro se* brief after copying significant portions of his co-defendant's attorney's brief. *Id.* at 160. The Court found that this did not satisfy Jenkins right to the effective assistance of counsel on appeal.

> Although Jenkins was able to raise two points in addition to those successfully advanced by his co-defendant's counsel, it is quite possible that an attorney would have found other arguments or would have been more articulate in the presentation of the case on appeal.
>
> "[N]either a review of the record by the Appellate Division nor a pro se brief can substitute for the single-minded advocacy of appellate counsel." *People* v. *Casiano*, 67 N.Y.2d 906, 907, 492 N. E.2d 1224, 1225, 501 N.Y.S.2d 808 (1986).

Id. at 161. The Court indicated that it was not necessary to speculate on the type of assistance that could have been provided or on the possible outcome of the appeal. Reversal was required because Jenkins had been denied counsel on appeal. *Id.* at 162.

The same analysis applies here. It is not possible to speculate as to how the Ohio Court of Appeals would have decided arguments or issues that could have been raised if Penson had effective counsel. Only that court can provide the answer after hearing the legal arguments of counsel on both sides.

It makes a mockery of Penson's right to counsel on appeal to suggest that it can be vicariously satisfied through co-defendants' counsel. Such a rule would permit appellate courts, where there are co-defendants, to assign an attorney to represent only one of them, and bind the rest by the result. Such a scenario compels the conclusion that the right to counsel on appeal is a personal right and can only be satisfied by counsel who represents the accused's interests and files a brief on his behalf.

If the denial of counsel had occurred at a trial where there were co-defendants represented by separate counsel, it is clear that prejudice would be presumed. *See, e.g., Green* v. *Arn*, 809 F.2d 1257 (6th Cir. 1987), *vacated on other grounds*, ___ U.S. ___, 98 L.Ed.2d 17 (1987) (prejudice presumed where counsel absent for portion of trial involving co-defendants represented by separate counsel). A complete denial of counsel on appeal should be treated no differently.

Similarly, if an accused represented himself at trial or on appeal, but there had not been a proper waiver of counsel, the court would not judge the quality of his self-representation to see if he had been prejudiced. The right

to counsel is either respected or denied. *Faretta* v. *California*, 422 U.S. 806 (1975); *McKaskle* v. *Wiggins*, 465 U.S. 168, 178 n. 8 (1984). It is not subject to a prejudice or harmless error test. *McKaskle, id.*

Because he was effectively denied counsel on appeal, Penson has not been afforded an opportunity to present his claims fairly to the Ohio appellate courts. In *Ross* v. *Moffitt*, 417 U.S. at 612, this Court held that an indigent state defendant did not have a right to counsel in the state supreme court where review by the court was discretionary. The Court reached this result because the accused's claims of error had "once been presented by a lawyer and passed upon by an appellate court"; *id.* at 614; and that this afforded him an opportunity to present his claims to the state appellate courts. *Id.* at 616. By contrast, Penson has not had "his claims" of error "presented by a lawyer and passed upon by an appellate court." This resulted in Penson being further denied meaningful access to the Supreme Court of Ohio. *Cf. Ross, id.* at 615. The Ohio Supreme Court will not consider issues that were not raised and preserved in the Court of Appeals. *Toledo* v. *Reasonover* (1965), 5 Ohio St.2d 22, 213 N.E.2d 179. Since Penson was denied "meaningful access," see *Ross, id.* at 615, to the Ohio appellate courts, he has not received the adequate and effective review to which he is constitutionally entitled. To hold otherwise is to remove the logical underpinning of this Court's decision in *Ross*.

V. THE RIGHT TO COUNSEL ON APPEAL PROTECTS IMPORTANT VALUES AND POLICIES IN OUR CRIMINAL JUSTICE SYSTEM WHICH WOULD BE JEOPARDIZED IF ITS DENIAL COULD BE CONSIDERED NON-PREJUDICIAL OR HARMLESS ERROR.

This Court has recognized that there are certain rights that are so fundamental to our system of justice that their

denial "can never be treated as harmless error." *See Chapman* v. *California*, 386 U.S. 18, 23 (1967). Among these is the right to counsel. *Id.* at 23 n. 8; *accord Rose* v. *Clark*, 478 U.S. ___, 92 L.Ed.2d 460 (1986) ("Harmless error analysis . . . presupposes a trial at which the defendant [is] represented by counsel. . .").

> "The right to the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice resulting from its denial."

Glasser v. *United States*, 315 U.S. 60 (1942); *accord Delaware* v. *Van Arsdall*, 475 U.S. ___, 89 L.Ed.2d 674, 685 (1986) (denial of counsel is error so fundamental and pervasive that reversal is required without regard to facts or circumstances of case). Of course, this Court has treated the denial of counsel differently than a violation of the Sixth Amendment which results in no prejudice to the ability of counsel to provide effective representation. *Cf. Moore* v. *Illinois*, 434 U.S. 220 (1977) (admission of witness identification in violation of right to counsel harmless error), and *Morrison*, 449 U.S. 361 (1981) (pretrial Sixth Amendment violation resulted in no prejudice to counsel's ability to provide adequate representation) with *Gideon*, 372 U.S. at 335 (1963) (denial of counsel at trial reversible error). This reflects the Court's policy to tailor the remedy to the injury suffered. *Morrison*, 449 U.S. at 365. Here, Penson was clearly denied counsel as his counsel provided no representation.

As demonstrated above, the due process right to counsel on appeal is one of the "minimum safeguards" necessary to assure an adequate and effective appeal for indigent defendants. *Evitts*, 469 U.S. at 392. Counsel's presence and effective participation in the appellate proceedings is essential to ensure their integrity and fairness. *Id.* at 395.

Like the denial of counsel at trial, the denial of counsel on appeal not only infects the validity of the judgment rendered by the court, but the very process by which it was obtained. *See Rushen* v. *Spain*, 464 U.S. 114, 124 n. 3 (1983), Justice Stevens, concurring. *Cf. Cronic*, 466 U.S. at 659. Therefore, the right to counsel for first appeals of right protects the fairness, and thus the legitimacy, of our adversary process. *Kimmelman*, 477 U.S. ___, 91 L.Ed.2d 305, 318. To deny this right is to jeopardize the very foundation of our "system for finally adjudicating the guilt or innocence of a defendant." *Griffin*, 351 U.S. at 18. *Accord Tehan* v. *Shott*, 382 U.S. 406, 416 (1966). As stated by the Court in *Griffin:*

> All of the States now provide some method of appeal from criminal convictions, recognizing the importance of appellate review to a correct adjudication of guilt or innocence. Statistics show that a substantial proportion of criminal convictions are reversed by state appellate courts. Thus, to deny adequate review to the poor means that many of them may lose their life, liberty and property because of unjust convictions which appellate courts would set aside . . . There can be no justice where the kind of trial a man gets depends on the amount of money he has.

Id. at 18-19. *See also Jones*, 463 U.S. at 756 n.1, Justice Brennan, dissenting ("the reversal rate of criminal convictions on mandatory appeals in the state courts, while not overwhelming, is certainly high enough to suggest that depriving defendants of their right to appeal would expose them to an unacceptable risk of erroneous conviction").

To require a showing of specific prejudice to a denial of counsel on appeal would have serious negative effects on

our state systems of appellate justice. It would permit our state appellate courts to do indirectly what they could not do directly since *Douglas*—deny an indigent accused his right to an advocate on appeal. Once appointed counsel reviewed the record and determined there was no merit to the appeal, the court, if it agreed, could affirm the conviction. The court could do this despite the failure of counsel to brief arguable, nonfrivolous issues, as in the case at bar. The accused would then have to somehow show that he was prejudiced or would have won the appeal had he been given counsel, to obtain another appeal. Few, if any, unrepresented, indigent defendants could reasonably be expected to do so any more than they could be expected to pursue their own appeal in the first place. Moreover, to extend this scenario to its logical conclusion, most indigent defendants could be denied counsel since most appeals are unsuccessful. Such appellate practices would clearly nullify the *Anders* decision and the right to counsel which it is designed to protect. *See Finley*, 481 U.S. at ___, 95 L.Ed.2d at 539. As a result, fair and reliable determinations of appeals would be undermined.

If such a hypothetical sounds farfetched, it is not. A number of intermediate appellate courts in Ohio have been affirming convictions under that very procedure.[11]

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[11] *See, e.g., State* v. *Freels* (April 4, 1984), Ham. App. No. C-830585, unreported, *rev'd, Freels* v. *Hills*, ___ F.2d ___, No. 87-3016, slip op. (6th Cir. April 6, 1988); *State* v. *McLindon* (Nov. 5, 1986), Ham. App. No. C-850868, unreported (First Appellate District); *State* v. *Poole* (Oct. 20, 1987), Allen App. No. 1-86-43, unreported (Third Appellate District); *State* v. *Sykes* (Jan. 26, 1984), Mahoning App. No. 82CA115, unreported; *accord State* v. *Toney*, (1970), 23 Ohio App.2d 203, 262 N.E.2d 419 (Seventh Appellate District); *State* v. *Birchfield* (Dec. 8, 1986), Butler App. No. CA86-07-099, unreported (Twelfth Appellate District). These unreported decisions have been lodged with the Clerk. Penson's case is from the Second Appellate District. *Cf. State* v. *Duncan* (1978), 57 Ohio App.2d 93 385 N.E.2d 323 (Eighth Appellate District).

As the Sixth Circuit recognized in *Freels*, ___ F.2d ___, No. 87-3016, slip op. at 12:

> "It is our observation that *Freels'* case is unfortunately not unique and that the advantages and requirements of *Anders*, although straightforward, are often ignored."

The only difference between Penson's case and the other Ohio cases is that the court below considered the issues raised by Penson's co-defendants. If the right to counsel on appeal is not to be further eroded in the Ohio appellate courts, this court must draw the line in this case. *See Cannon*, 727 F.2d at 1024.

Additionally, requiring a showing of prejudice for noncompliance with *Anders* would substantially burden our state appellate courts. Courts would have to search the record for issues in order to determine if the accused was prejudiced by counsel's inaction. The court would be forced to virtually speculate as to the outcome of the issues without briefing and oral argument, the very cornerstones of appellate advocacy. The court would not have the benefit of counsel's references to the record and citation of legal authorities, see *Anders*, 386 U.S. at 745, but would have to review a cold record without the help of counsel. *Id.* In short, the court would be forced to perform counsel's function. Moreover, meagerly paid appointed counsel would be encouraged to shift responsibility for review of the record to the court if *Anders* could be ignored. The inevitable effect of removing *Anders'* requirement that an adequate brief be filed would be a disintegration of the right to counsel on appeal for many indigent defendants. This is evident now in a number of Ohio appellate districts. *See* Ohio cases cited above, at 42, n. 11 and the *Amicus Curiae* Brief of the Ohio Association of Criminal Defense Lawyers, at § I.

Proper respect for the right to counsel on appeal requires recognition of the proper roles of counsel and the appellate court. It should be counsel's job, not the court's, to review the record for errors and present legal arguments on the nonfrivolous claims he believes best support the appeal. *See Jones*, 463 U.S. at 754. It is counsel's constitutional responsibility to perform as an advocate and the *Anders* decision and procedures are the means by which the court sees that counsel fulfills that responsibility. *See Nickols* v. *Gagnon*, 454 F.2d at 471; *Finley*, 481 U.S. at ___, 95 L.Ed.2d at 545. Similarly, it is the court's job, not counsel's, to judge the merits of the appeal. *United States* v. *Blackwell*, 767 F.2d 1486 (11th Cir. 1985). The District of Columbia Court of Appeals in *Suggs* v. *United States*, 391 F.2d 971 (D.C. Cir. 1968) described the appropriate relationship between court and counsel:

> Our role as a court is as arbiter of the interests of Government and accused. We cannot successfully and constitutionally perform that function unless we consider a presentation devoted to arguments for the accused, leaving it to us to determine whether and to what extent they have merit. That is our understanding, at least, of the philosophy underlying *Anders*.

Id. at 975. Of course, if the court does not require counsel to comply with *Anders*, as in the instant case, the right to counsel is meaningless.

The result argued for by respondent would have further negative implications. Because a denial of counsel does not satisfy the appearance of justice, it places a cloud of suspicion over our appellate system of justice:

> . . . [F]inal judgment against an indigent should not be compromised by a possibility that a different result would have ensued if only he had the resources

> to retain his own lawyer, instead of being required to accept counsel selected by the court. Much depends on a system that avoids suspicion of such compromise, for reasons that include awareness that where there is a basis for such suspicion prospects of rehabilitation are stifled. *Justice must not only be done, it must appear to be done*, *Offutt* v. *United States*, 348 U.S. 11, 14 (1954).

Suggs, 391 F.2d at 974. The indigent accused denied the assistance of counsel on appeal would not feel he had been dealt with fairly by the system. *See id.* at 974. This would likely generate further *pro se* filings and litigation by the accused that the courts and prosecutors would have to answer. This result would not contribute to the finality of litigation. Claims of ineffective assistance of appellate counsel would likely increase in the state and federal courts. Federal courts would be called on in federal habeas proceedings to determine if the state appellate court's determination that the defendant was not prejudiced was correct. The Court would, like the state appellate court, probably have to review the record without any previous identification or discussion of issues by counsel. This would include analyzing state law issues. Principles of comity discourage federal court intrusion into matters more appropriately left to the state courts. *Galloway* v. *Stephenson*, 510 F. Supp. at 844.

On the other hand, a rule applying a presumption of prejudice when counsel is constructively denied is easy for the courts to follow. The violation is easy to identify and because the court is directly responsible, easy for the court to prevent. *See Strickland*, 466 U.S. at 692; *Cannon*, 727 F.2d at 1024 n. 9. It further accords the appropriate respect for the fundamental right to counsel on appeal; and provides the accused counsel who renders constitutionally effective assistance as an advocate. Of the possi-

ble alternatives, it is surely the best way to guarantee an indigent accused an opportunity for an adequate and effective review of his conviction.

CONCLUSION

For the foregoing reasons, Petitioner Steven Anthony Penson requests that the judgment of the Montgomery County, Ohio Court of Appeals be reversed and that the court be ordered to provide him with another appeal in which he is afforded the assistance of counsel.

Respectfully submitted,

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APPENDIX

APPENDIX

OHIO CONSTITUTION

ARTICLE IV: JUDICIAL

§ 3 Court of Appeals.

(A) The state shall be divided by law into compact appeals districts in each of which there shall be a court of appeals consisting of three judges. Laws may be passed increasing the number of the judges in any district wherein the volume of business may require such additional judge or judges. In districts having additional judges, three judges shall participate in the hearing and disposition of each case. The court shall hold sessions in each county of the district as the necessity arises. The county commissioners of each county shall provide a proper and convenient place for the court of appeals to hold court.

(B)(1) The courts of appeals shall have original jurisdiction in the following:

(a) Quo warranto;
(b) Mandamus;
(c) Habeas corpus;
(d) Prohibition;
(e) Procedendo;
(f) In any cause on review as may be necessary to its complete determination.

(2) Courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district and shall have such appellate jurisdiction as may be provided by law to review and affirm, modify, or reverse final orders or actions of administrative officers or agencies.

(3) A majority of the judges hearing the cause shall be necessary to render a judgment. Judgments of the courts of appeals are final except as provided in section 2(B)(2) of this article. No judgment resulting from a trial by jury shall be reversed on the weight of the evidence except by the concurrence of all three judges hearing the cause.

(4) Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination.

(C) Laws may be passed providing for the reporting of cases in the courts of appeals. (Adopted May 7, 1968. Former § 3 repealed and analogous provisions reenacted as § 4.)

OHIO REVISED CODE

§ 2903.11. Felonious assault.

(A) No person shall knowingly:

(1) Cause serious physical harm to another;

(2) Cause or attempt to cause physical harm to another by means of a deadly weapon or dangerous ordnance, as defined in section 2923.11 of the Revised Code.

(B) Whoever violates this section is guilty of felonious assault, an aggravated felony of the second degree. If the victim of the offense is a peace officer, as defined in section 2935.01 of the Revised Code, felonious assault is an aggravated felony of the first degree.

OHIO REVISED CODE

§ 2907.02. Rape.

(A) No person shall engage in sexual conduct with another, not the spouse of the offender, when any of the following apply:

(1) The offender purposely compels the other person to submit by force or threat of force.

(2) For the purpose of preventing resistance, the offender substantially impairs the other person's judgement or control by administering any drug or intoxicant to the other person, surreptitiously or by force, threat of force, or deception.

(3) The other person is less than thirteen years of age, whether or not the offender knows the age of the such person.

(B) Whoever violates this section is guilty of rape, an aggravated felony of the first degree. If the offender under division (A)(3) of this section purposely compels the victim to submit by force or threat of force, whoever violates division (A)(3) of this section shall be imprisoned for life.

(C) A victim need not prove physical resistance to the offender in prosecutions under this section.

(D) Evidence of specific instances of the victim's sexual activity, opinion evidence of the victim's sexual activity, and reputation evidence of the victim's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, or the victim's past sexual activity with the offender, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

Evidence of specific instances of the defendant's sexual activity, opinion evidence of the defendant's sexual activity, and reputation evidence of the defendant's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, the defendant's past sexual activity with the victim, or is admissible against the defendant under section 2945.59 of the Revised Code, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

(E) Prior to taking testimony or receiving evidence of any sexual activity of the victim or the defendant in a proceeding under this section, the court shall resolve the admissibility of the proposed evidence in a hearing in chambers, which shall be held at or before preliminary hearing and not less than three days before trial, or for good cause shown during the trial.

(F) Upon approval by the court, the victim may be represented by counsel in any hearing in chambers or other proceeding to resolve the admissibility of evidence. If the

victim is indigent or otherwise unable to obtain the services of counsel, the court may, upon request, appoint counsel to represent the victim without cost to the victim.

OHIO REVISED CODE

§ 2907.05. Gross sexual imposition.

(A) No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons, to have sexual contact when any of the following apply:

(1) The offender purposely compels the other person, or one of the other persons, to submit by force or threat of force.

(2) For the purpose of preventing resistance, the offender substantially impairs the other person's, or one of the other persons', judgement or control by administering any drug or intoxicant to the other person, surreptitiously or by force, threat of force, or deception.

(3) The other person, or one of the other persons, is less than thirteen years of age, whether or not the offender knows the age of such person.

(B) Whoever violates this section is guilty of gross sexual imposition. Violation of division (A)(1) or (2) of this section is a felony of the fourth degree. Violation of division (A)(3) of this section is a felony of the third degree.

(C) A victim need not prove physical resistance to the offender in prosecutions under this section.

(D) Evidence of specific instances of the victim's sexual activity, opinion evidence of the victim's sexual activity, and reputation evidence of the victim's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, or the victim's past sexual activity with the offender, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweight its probative value.

Evidence of specific instances of the defendant's sexual

activity, opinion evidence of the defendant's sexual activity, and reputation evidence of the defendant's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, the defendant's past sexual activity with the victim, or is admissible against the defendant under section 2945.59 of the Revised Code, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

(E) Prior to taking testimony or receiving evidence of any sexual activity of the victim or the defendant in a proceeding under this section, the court shall resolve the admissibility of the proposed evidence in a hearing in chambers, which shall be held at or before preliminary hearing and not less than three days before trial, or for good cause shown during the trial.

(F) Upon approval by the court, the victim may be represented by counsel in any hearing in chambers or other proceeding to resolve the admissibility of evidence. If the victim is indigent or otherwise unable to obtain the services of counsel, the court may, upon request appoint counsel to represent the victim without cost to the victim.

OHIO REVISED CODE

§ 2911.01. Aggravated Robbery.

(A) No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after such attempt or offense, shall do either of the following:

(1) Have a deadly weapon or dangerous ordnance, as defined in section 2923.11 of the Revised Code, on or about his person or under his control.

(2) Inflict, or attempt to inflict serious physical harm on another.

(B) Whoever violates this section is guilty of aggravated robbery, an aggravated felony of the first degree.

OHIO REVISED CODE

§ 2911.11. Aggravated burglary.

(A) No person, by force, stealth, or deception, shall trespass in an occupied structure, as defined in section 2909.01 of the Revised Code, or in a separately secured or separately occupied portion thereof, with purpose to commit therein any theft offense, as defined in section 2913.01 of the Revised Code, or any felony, when any of the following apply:

(1) The offender inflicts, or attempts or threatens to inflict physical harm on another;

(2) The offender has a deadly weapon or dangerous ordnance, as defined in section 2923.11 of the Revised Code, on or about his person or under his control;

(3) The occupied structure involved is the permanent or temporary habitation of any person, in which at the time any person is present or likely to be present.

(B) Whoever violates this section is guilty of aggravated burglary, an aggravated felony of the first degree.

OHIO REVISED CODE

§ 2923.02. Attempt.

(A) No person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct which, if successful, would constitute or result in the offense.

(B) It is no defense to a charge under this section that, in retrospect, commission of the offense which was the object of the attempt was impossible under the circumstances.

(C) No person who is convicted of committing a specific offense, of complicity in the commission of such offense, or of conspiracy to commit such offense, shall be convicted of an attempt to commit the same offense in violation of this section.

(D) It is an affirmative defense to a charge under this section that the actor abandoned his effort to commit the

offense or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.

(E) Whoever violates this section is guilty of an attempt to commit an offense. An attempt to commit aggravated murder or murder is a felony of the first degree. An attempt to commit an aggravated felony of the first or second degree is an aggravated felony of the next lesser aggravated degree than the aggravated felony attempted. An attempt to commit an aggravated felony of the third degree is a felony of the fourth degree. An attempt to commit any other offense is an offense of the next lesser degree than the offense attempted. In the case of an attempt to commit an offense other than a violation of Chapter 3734. of the Revised Code that is not specifically classified, an attempt is a misdemeanor of the first degree if the offense attempted is a felony, and a misdemeanor of the fourth degree if the offense attempted is a misdemeanor. In the case of an attempt to commit a violation of any provision of Chapter 3734. of the Revised Code, other than section 3734.18 of the Revised Code, that relates to hazardous wastes, an attempt is a felony punishable by a fine of not more than twenty-five thousand dollars or imprisonment for not more than eighteen months, or both. An attempt to commit a minor misdemeanor, or to engage in conspiracy, is not an offense under this section.

OHIO REVISED CODE

§ 2923.13. Having weapons while under disability.

(A) Unless relieved from disability as provided in section 2923.14 of the Revised Code, no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if any of the following apply:

(1) Such person is a fugitive from justice;

(2) Such person is under indictment for or has been convicted of any felony of violence, or has been adjudged a juvenile delinquent for commission of any such felony;

(3) Such person is under indictment for or has been convicted of any offense involving the illegal possession, use, sale, administration, distribution, or trafficking in

any drug of abuse, or has been adjudged a juvenile delinquent for commission of any such offense;

(4) Such person is drug dependent or in danger of drug dependence, or is a chronic alcoholic;

(5) Such person is under the adjudication of mental incompetence.

(B) Whoever violates this section is guilty of having weapons while under disability, a felony of the fourth degree.

OHIO REVISED CODE

§ 2929.71. Additional three years of actual incarceration for offenses involving a firearm.

(A) The court shall impose a term of actual incarceration of three years in addition to imposing a life sentence pursuant to section 2907.02, 2907.12, or 2929.02 of the Revised Code or an indefinite term of imprisonment pursuant to section 2929.11 of the Revised Code if both of the following apply:

(1) The offender is convicted of, or pleads guilty to, any felony other than a violation of section 2923.12 of the Revised Code;

(2) The offender is also convicted of, or pleads guilty to, a specification charging him with having a firearm on or about his person or under his control while committing the felony. The three-year term of actual incarceration imposed pursuant to this section shall be served consecutively with, and prior to, the life sentence or the indefinite term of imprisonment.

(B) If an offender is convicted of, or pleads guilty to, two or more felonies and two or more specifications charging him with having a firearm on or about his person or under his control while committing the felonies, each of the three-year terms of actual incarceration imposed pursuant to this section shall be served consecutively with, and prior to the life sentences or indefinite terms of imprisonment imposed pursuant to section 2907.02, 2907.12, 2929.02, or 2929.11 of the Revised Code, unless any of the

felonies were committed as part of the same act or transaction. If any of the felonies were committed as part of the same act or transaction, only one three-year term of actual incarceration shall be imposed for those offenses, which three-year term shall be served consecutively with, and prior to, the life sentences or indefinite terms of imprisonment imposed pursuant to section 2907.02, 2907.12, 2929.02, or 2929.11 of the Revised Code.

(C) No person shall be sentenced pursuant to division (A) of this section unless the indictment, count in the indictment, or information charging him with the offense contains a specification as set forth in section 2941.141 [2941.14.1] of the Revised Code.

(D) As used in this section:

(1) "Firearm" has the same meaning as in section 2923.11 of the Revised Code;

(2) "Actual incarceration" has the same meaning as in division (C) of section 2929.01 of the Revised Code, except that a term of actual incarceration imposed pursuant to this section shall not be diminished pursuant to section 2967.19 of the Revised Code.

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§ 2953.02. Review of judgments.

In a criminal case, including a conviction for the violation of an ordinance of a municipal corporation, the judgment or final order of a court of record inferior to the court of appeals may be reviewed in the court of appeals. A final order of an administrative officer or agency may be reviewed in the court of common pleas. A judgment or final order of the court of appeals involving a question arising under the Constitution of the United States or of this state may be appealed to the supreme court as a matter of right. This right of appeal from judgments and final orders of the court of appeals shall extend to cases in which the death penalty has been affirmed, felony cases in which the supreme court has directed the court of appeals to certify its record, and in all other criminal cases of public or general interest wherein the supreme court has granted a motion to certify the record of the court of appeals. The

supreme court in criminal cases shall not be required to determine as to the weight of the evidence, except as provided in section 2929.05 of the Revised Code.

OHIO RULES OF APPELLATE PROCEDURE

RULE 3. APPEAL AS OF RIGHT-HOW TAKEN

(A) Filing the Notice of Appeal. An appeal as of right shall be taken by filing a notice of appeal with the clerk of the trial court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. Appeals by leave of court shall be taken in the manner prescribed by Rule 5.

(B) Joint or Consolidated Appeals. If two or more persons are entitled to appeal from a judgment or order of a trial court and their interests are such as to make joinder practicable, they may file a joint notice of appeal, or may join in appeal after filing separate timely notices of appeal, and they may thereafter proceed on appeal as a single appellant. Appeals may be consolidated by order of the court of appeals upon its own motion or upon motion of a party, or by stipulation of the parties to the several appeals.

(C) Content of the Notice of Appeal. The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. The title of the case shall be the same as in the trial court with the designation of the appellant added, as appropriate. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal.

(D) Service of the Notice of Appeal. The clerk of the trial court shall serve notice of the filing of a notice of appeal and, where required by local rule, a docketing statement, by mailing a copy thereof to counsel of record of each party other than the appellant, or, if a party is not represented by counsel, to the party at his last known address; and the clerk shall mail or otherwise forward a copy of the notice of appeal and of the docket entries,

together with a copy of all filings by appellant pursuant to Rule 9(B), to the clerk of the court of appeals named in the notice. The clerk shall note on each copy served the date on which the notice of appeal was filed. Failure of the clerk to serve notice shall not affect the validity of the appeal. Service shall be sufficient notwithstanding the death of a party or his counsel. The clerk shall note in the docket the names of the parties to whom he mails copies, with the date of mailing.

(E) Amendment of the Notice of Appeal. The court of appeals within its discretion and upon such terms as are just may allow the amendment of a timely filed notice of appeal.

(F) Docketing Statement. If the court of appeals has adopted an accelerated calendar by local rule pursuant to Rule 11.1, a docketing statement shall be filed with the Clerk of the trial court with the notice of appeal. (See Form 2, Appendix of Forms.)

The purpose of the docketing statement is to determine whether an appeal will be assigned to the accelerated or the regular calendar.

A case may be assigned to the accelerated calendar if any of the following apply:

(1) No transcript is required (e.g., summary judgment or judgment on the pleadings);

(2) The length of the transcript is such that its preparation time will not be a source of delay;

(3) An agreed statement is submitted in lieu of the record;

(4) The record was made in an administrative hearing and filed with the trial court;

(5) All parties to the appeal approve an assignment of the appeal to the accelerated calendar; or

(6) The case has been designated by local rule for the accelerated calendar.

The court of appeals by local rule may assign a case to the accelerated calendar at any stage of the proceeding.

The court of appeals may provide by local rule for an oral hearing before a full panel in order to assist it in determining whether the appeal should be assigned to the accelerated calendar.

Upon motion of appellant or appellee for a procedural order pursuant to App.R.15(B) filed within seven days after the notice of appeal is filed with the clerk of the trial court, a case may be removed for good cause from the accelerated calendar and assigned to the regular calendar. Demonstration of a unique issue of law which will be of substantial precedential value in the determination of similar cases will ordinarily be good cause for transfer to the regular calendar.